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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re: HEXCEL CORPORATION, a Delaware corporation, Reorganized Debtor.	Case No. 93-48535 T Chapter 11
HEXCEL CORPORATION, a Delaware corporation, Plaintiff, vs. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	A.P. No. 04-4246 Date: February 17, 2005 Time: 2:00 p.m. Place: 1300 Clay Street Courtroom No. 201 Oakland, CA Judge: Hon. Leslie Tchaikovsky

PLAINTIFF HEXCEL CORPORATION'S OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

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I. INTRODUCTION

On September 19, 2003, the New Jersey Department of Environmental Protection ("NJDEP") issued Directive No. 1 regarding "Natural Resource Injury Assessment and Interim Compensatory Restoration of Natural Resources Injuries." The Directive named Hexcel Corporation ("Hexcel") as one party responsible for the discharge of hazardous substances to the Lower Passaic River from its former chemical manufacturing facility in Lodi, New Jersey (the "Lodi Facility"). The Directive was issued pursuant to the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 *et seq.* (the "Spill Act"). As stated in NJDEP's motion for summary judgment, "The Directive *orders* Hexcel and the other named parties to assess the natural resources *that have been injured* by the discharge of hazardous substances into the Lower Passaic River, quantify the value of the injuries, and implement interim *compensatory restoration* for these resources." NJDEP Brief at 6-7 (citing Directive, pp. 54-55, ¶¶ 300-301, Ex. L to Stiener Decl.) (emphasis added). The Directive also makes clear that if Hexcel and the other named parties ("Respondents") fail to undertake the specified actions, NJDEP will undertake the actions using public funds and then may seek reimbursement from Respondents for all costs incurred, including treble damages and penalties. Directive, pp. 55-56, ¶¶ 304-307. In a NJDEP letter to Respondents dated July 28, 2004, NJDEP further demanded a commitment of "$80 million"[1] to be paid towards the Passaic River interim restoration fund. Letter dated July 28, 2004 from NJDEP to William H. Hyatt at 2, attached as Ex. A to Leifer Declaration ("Leifer Decl."), attached hereto. Again, should Respondents fail to submit to this demand, NJDEP emphasized that the "$50 million" in public funds "already identified" plus "additional funds" will be the basis for its assessment of treble damages, up to three times these expenditures for

[1] The letter states that "known dioxin dischargers" initially would be allocated 75 percent of the $80 million contribution. While Hexcel does not believe it falls into this category, the letter does not define which companies would or would not be included.

non-complying Respondents. Ex. A to Leifer Decl. at 2; Directive, p. 55, ¶ 306.

Apart from these claims made against Hexcel related to alleged past releases, Hexcel faces certain ongoing environmental obligations pursuant to the Environmental Cleanup Responsibility Act ("ECRA") (renamed the Industrial Site Recovery Act, and hereinafter referred to as "ISRA") stemming from its sale of the Lodi Facility in 1986. Hexcel and NJDEP entered into an Administrative Consent Order ("ACO") on March 26, 1986, to effectuate Hexcel's responsibilities under ISRA. Since that time, Hexcel has worked with NJDEP to investigate the on-site contamination and conduct cleanup at the Lodi Facility to ensure that there is no risk of ongoing pollution.[2] As part of its work pursuant to the ACO, Hexcel also has undertaken environmental sampling in the immediate vicinity of the Lodi Facility, including off-site sediment sampling in the Saddle River adjacent to the facility.[3]

Hexcel filed its complaint in this adversary proceeding on July 30, 2004. In the complaint, Hexcel seeks to discharge claims made by NJDEP pursuant to the Directive. The First Claim for Relief, regarding the discharge of claims of NJDEP, refers only to claims "set forth in the NJDEP Directive" and obligations "allegedly owed to NJDEP by Hexcel for natural resource damage to the Lower Passaic River." Complaint ¶¶ 29-30. The complaint also states that the claims arise "from Hexcel's operation of the Lodi Site prior to the Petition Date" thus making clear that the claims sought to be discharged stem from past operations and do not relate to ongoing releases. The First Claim for Relief does not refer to Hexcel's environmental responsibilities under ISRA or the ACO. Similarly, in the Third and Fourth Claims for Relief,[4]

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[2] *See* November 1999 "Remedial Action Workplan Addendum" submitted to NJDEP, summarizing past activities at the site and detailing planned remediation activities, attached hereto as Ex. B to Leifer Decl (without appendices).

[3] *See* October 8, 2003 letter from Haley & Aldrich on behalf of Hexcel to NJDEP, reporting on sediment and surface water sampling in the Saddle River, attached hereto as Ex. C to Leifer Decl. (attached without tables, figures and appendices).

[4] The Second Claim for Relief applies only to the U.S. Environmental Protection Agency and not NJDEP.

Hexcel only refers to claims by NJDEP as set forth in the NJDEP Directive. Finally, in the Prayer for Relief, Hexcel seeks a judicial determination that "the claims of the NJDEP *as set forth in the NJDEP Directive* have been forever discharged under the Bankruptcy Code...." Complaint at p. 9, ¶ 1. Hexcel's complaint seeks to discharge only those claims raised by NJDEP under the Directive and does not relate to the company's environmental obligations under ISRA or the ACO. Indeed, Hexcel does not dispute or challenge the ISRA or ACO obligations; rather Hexcel fully intends to continue to perform in accordance with those obligations.[5]

II. SUMMARY OF ARGUMENT

NJDEP seeks summary judgment based on three main grounds. First, NJDEP argues that Hexcel seeks to extinguish environmental obligations that are not dischargeable under the Bankruptcy Code. In this part of its argument, NJDEP improperly focuses both on environmental responsibilities placed on Hexcel under ISRA as well as responsibilities agreed to by Hexcel in the ACO. Second, NJDEP argues that Hexcel's complaint seeks pre-enforcement review of the Directive and thus is barred. Finally, NJDEP argues that Hexcel's claims are not yet ripe for review.

NJDEP's arguments regarding the non-dischargeability of the claims asserted against Hexcel are misplaced. Pursuant to the Spill Act, the Directive requires Hexcel to undertake certain actions to assess and remediate natural resources injuries stemming from alleged past discharges. In the alternative, also pursuant to the Spill Act, the Directive seeks

[5] Hexcel's Third Prayer for Relief, which seeks to enjoin NJDEP from "taking any action against Hexcel or its property in any legal or administrative proceeding in the State of New Jersey or elsewhere seeking monetary or other relief based on Hexcel's operation of the Lodi Site," could be improperly construed as an attempt by Hexcel to prevent NJDEP from enforcing ISRA and the ACO. Complaint at p. 9, ¶ 3. However, this Prayer for Relief should be read in conjunction with the Claims for Relief, which relate only to the Directive. Hexcel emphasizes that the relief requested is limited to the claims raised by NJDEP under the Spill Act, not with respect to any responsibilities under ISRA or the ACO. To the extent clarification is necessary, Hexcel can amend its complaint.

payment to NJDEP so that NJDEP can undertake the activities. The Directive does not seek to stem ongoing pollution, but to remediate past natural resources damages. The Directive places no responsibilities on Hexcel regarding the on-site cleanup activities at its Lodi Facility.

Ignoring the Directive and the Spill Act, NJDEP argues that Hexcel seeks to discharge its environmental obligations under ISRA and the ACO. According to NJDEP, environmental responsibilities related to ISRA are not dischargeable because they relate to ongoing pollution. Hexcel does not deny that it has certain responsibilities related to its Lodi Facility under ISRA and the ACO that were not discharged in bankruptcy. Hexcel intends to fulfill its obligations under ISRA as well as under the ACO and does not seek to discharge those obligations here.[6] Rather, Hexcel seeks to discharge the obligations under the Directive and the Spill Act related only to contamination related to spills alleged to have occurred pre-petition. Unlike the environmental obligations under ISRA and the ACO, NJDEP's claims under the Spill Act and the Directive are indeed claims that are dischargeable in bankruptcy.

NJDEP similarly mischaracterizes the discharge sought by Hexcel, and confuses the bankruptcy discharge determination sought by Hexcel with a request for pre-enforcement review of the scope of Hexcel's liability. Hexcel *does not* seek a determination by this Court that it is not liable to NJDEP under the Spill Act.[7] Instead, Hexcel asserts that its liability with respect to NJDEP's claims, to the extent it even exists, was discharged, having arisen pre-petition and having been fairly contemplated by NJDEP at the time of Hexcel's bankruptcy. This does not amount to pre-enforcement review and the cases cited by NJDEP are therefore inapposite.

NJDEP's remaining argument that Hexcel's complaint is premature lies in its

[6] Nor has NJDEP contended here that Hexcel is in default of any of its obligations under the ACO.

[7] Hexcel of course reserves its right to challenge its liability at the appropriate time.

allegation that the Directive and subsequent actions do not amount to enforcement action ripe for judicial review. However, because the actions of NJDEP rise to the level of threatened enforcement that has the effect of final enforcement action, and further, because the factual issues are based primarily on events that took place in the past, the proceeding is fit for judicial review. Hexcel's Complaint also is ripe because Hexcel would suffer more hardship if the matter were not decided than NJDEP would suffer if the case were decided. Indeed, NJDEP cannot demonstrate any harm it would face from this court determining that its claims arising from pre-petition activity were discharged in bankruptcy. In contrast, Hexcel, along with the other of Respondents, will be compelled to pay up to $80 million, or suffer consequences of increasing penalties and mounting costs associated with the defense of this impending litigation. Furthermore, if this matter is not decided, Hexcel's post-confirmation lenders, investors and creditors will be harmed for reasonably relying upon the fact that NJDEP's claims, arising from pre-petition conduct, were discharged in bankruptcy. Such a result would allow NJDEP to completely circumvent the fresh start objectives of the Bankruptcy Code to the detriment of not only Hexcel, but also multiple other parties.

III. ARGUMENT

A. Standard Of Review

FRCP 56(c) authorizes summary judgment if "no genuine issue" exists regarding any material fact and "the moving party is entitled to judgment as a matter of law." The moving party must show an absence of an issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The moving party also must demonstrate the right to judgment as a matter of law in the context of undisputed facts. *Aronsen v. Crown Zellerbach,* 662 F.2d 584, 591 (9th Cir. 1981); *see also Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 639 (9th Cir. 1969) ("Summary judgment is not to be granted merely because there are no genuine issues of material fact, and it

must also appear on the undisputed facts that person making the motion is entitled to judgment as a matter of law.")

The court must view the inferences drawn from the facts "in the light most favorable to the nonmoving party." *T. W. Elec. Serv. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 631 (9th Cir. 1987). Thus, reasonable doubts about the existence of a factual issue should be resolved against the moving party. *Id.* Summary judgment is therefore not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts..." *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 (9th Cir. 1980).

"In addition to the defense of a genuine dispute of material fact, to successfully resist summary judgment, there must be at least one viable theory of law, under the asserted version of facts, that would, if true, entitle the opponent of the motion to a judgment as a matter of law." *Arney v. U.S.*, 479 F.2d 653, 661 (9th Cir. 1973). *See also, Friends of the Earth v. Coleman*, 513 F.2d 295, 298 (9th Cir. 1975) ("Showing of a genuine issue for trial by a party opposing motion for summary judgment is predicated upon existence of a legal theory which remains viable under asserted version of facts and which would entitle party to a judgment as a matter of law. *Bushie v. Stenocord Corp.,* 460 F.2d 116, 119 (9th Cir. 1972) ("Showing of genuine issue for trial is predicated upon existence of legal theory which remains viable under asserted version of facts and which would entitle party opposing motion for summary judgment to judgment as matter of law.")

B. NJDEP's Claims Against Hexcel Under The New Jersey Spill Compensation And Control Act Are Dischargeable Claims Under The Bankruptcy Code.

Points I and II of NJDEP's Brief focus on the same issue: whether the liabilities Hexcel seeks to discharge are "claims" under the Bankruptcy Code or whether they are environmental obligations that may not be discharged. As such, these two Points will be

discussed together, as they do not present any separate argument.

NJDEP's argument in this portion of its brief focuses entirely on Hexcel's responsibilities under the ISRA. NJDEP's focus is misplaced and inappropriately steers the Court away from the real issue – whether New Jersey's claims set forth against Hexcel in the Directive pursuant to the Spill Act were discharged in bankruptcy. *NJDEP's entire argument regarding the non-dischargeability of Hexcel's environmental obligations under ISRA (and the environmental obligations under the ACO, discussed in the next section) is inapposite because Hexcel is not attempting to discharge these obligations.* For the purposes of this motion, Hexcel concedes that its responsibilities under ISRA and the ACO are environmental obligations that passed through bankruptcy and that Hexcel, in good faith, will perform. However, as discussed more fully below, NJDEP's claims under the Directive relate only to past activities under the Spill Act, are claims for which there is an alternative right to payment, and have nothing to do with the activities required by the ACO. As such, the wholly separate Spill Act claims are dischargeable under the Bankruptcy Code.

The Directive seeks to compel an assessment of past injuries to the natural resources of the Lower Passaic River and to compel interim compensatory restoration of those past natural resources injuries. Should Hexcel and other Respondents fail to undertake the assessment and restoration, the Directive seeks payment so that the NJDEP can carry out these activities. The Directive does not seek to stem ongoing pollution or to force Hexcel to clean up its Lodi Facility located on the Saddle River. These are the responsibilities that Hexcel retains under the ACO and ISRA. Through the Directive, NJDEP is focused only on *past* injuries and payment for the remediation of those past injuries. This represents a dischargeable claim under the Bankruptcy Code and not ongoing environmental obligations.

The language of the Directive itself makes clear that it is focused only on past activities and that NJDEP's Spill Act claims essentially are requests for payment. For example, Paragraph 273 of the Directive states with respect to Hexcel that NJDEP "has determined that Hexcel Corporation ... [is a person] in any way responsible, pursuant to the Spill Compensation and Control Act, for hazardous substances that *were discharged* at the Hexcel Site." (emphasis added). With respect to all parties named in the Directive, Paragraph 293 states that "Respondents are responsible for the hazardous substances in the Lower Passaic River that *were discharged* onto the land and into the waters of the State." (emphasis added). Paragraphs 294 and 295 of the Directive state that Respondents, including Hexcel, are responsible "for all cleanup and removal costs," including "all costs ... incurred by the Department." Paragraph 299 explains that the NJDEP "may, in its discretion, act to clean up and remove or arrange for the clean up and removal of the discharge...," thus making clear that there is an alternative right to payment. Paragraph 300 of the Directive directs Respondents, including Hexcel, to "conduct an assessment of natural resources that *have been injured*," (emphasis added), and Paragraph 301 directs Respondents to "implement interim compensatory restoration for natural resources that *have been injured* by discharges of hazardous substances at sites in the Lower Passaic River watershed." (emphasis added). And finally, if the Respondents, including Hexcel, fail to meet the requirements of the Directive, Paragraphs 304-307 make clear that the NJDEP can undertake the actions itself – under the Spill Act, not ISRA – and then seek reimbursement from the Respondents, including treble damages and penalties.

Under Section 101(5)(B) of the Bankruptcy Code, 11 U.S.C. § 101(5)(B), a claim for injunctive relief is discharged in bankruptcy if there is an alternative "right to payment." That section defines "claim" to mean a:

> right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Here, NJDEP's Spill Act claims in the Directive, which demand the assessment and remediation of *past* pollution, are dischargeable because a "right to payment" is afforded by the Spill Act: NJDEP can do the job itself and then sue to recover its costs. In its brief, NJDEP reaches a different conclusion because the agency confuses the claims sought to be discharged here pursuant to the Spill Act with environmental obligations Hexcel does not seek to discharge under ISRA and the ACO.

NJDEP principally relies on *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3d Cir. 1993) to support its contention that "ongoing environmental liabilities under ISRA are not 'claims,' but rather are non-dischargeable responsibilities to perform a cleanup on an ongoing hazard from the discharge of hazardous substances." NJDEP Brief at 11. NJDEP's reliance is misplaced for multiple reasons. First and foremost, NJDEP's discussion of *Torwico* relates only to environmental responsibilities under ISRA, which Hexcel concedes were not discharged in bankruptcy, and not to the actual claims under the Directive that relate only to the Spill Act. Indeed, NJDEP's entire discussion in Points I and II of its brief does not mention the Spill Act one time, despite the fact that the Spill Act is the sole basis for the Directive. NJDEP's extended argument for why the ISRA claims cannot be discharged in bankruptcy is entirely off point and irrelevant to the case at hand. Second, the Directive is not based on ongoing contamination from the Hexcel property; rather, it seeks only to remedy *past* contamination. Thus, *Torwico's* conclusion regarding ongoing ISRA obligations does not apply to the Spill Act claims here. In any event, whether or not there is ongoing contamination is a fact issue and thus not susceptible to summary judgment. NJDEP has put forth no evidence or argument that there is ongoing

pollution emanating from the Lodi Facility. NJDEP's implicit assumption in its brief that pollution is ongoing is not sufficient to remove the fact issue. Regardless, as described below, Hexcel is not seeking to discharge any responsibilities relating to ongoing pollution or on-site cleanup under the ACO or ISRA, so the issue is moot.

When viewed in relation to the Spill Act claims which Hexcel seeks to discharge, *Torwico* and the case law cited therein actually support the argument that such claims are dischargeable in bankruptcy and are not ongoing environmental obligations. In addition to *Torwico*, three important precedential cases here are *Ohio v. Kovacs*, 469 U.S. 274 (1985), *In re Chateaugay*, 944 F.2d 997 (2d Cir. 1991), and *In re CMC Heartland Partners*, 966 F.2d 1143 (7th Cir. 1992). The *Torwico* court discussed all of these cases in reaching its conclusion that ISRA requirements are ongoing environmental obligations that are not dischargeable in bankruptcy. Taken together, these decisions provide the basis for determining that the Spill Act claims are indeed dischargeable.

In *Ohio v. Kovacs*, the State of Ohio obtained an injunction that ordered Kovacs to clean up a hazardous waste site. 469 U.S. at 276. Kovacs failed to comply with the injunction and the state appointed a receiver to take control of the site and to perform cleanup. *Id.* Before the receiver completed the cleanup, Kovacs filed for personal bankruptcy. *Id.* The State then filed a motion in the bankruptcy proceeding arguing that Kovacs's obligation under the order to clean up the site was not dischargeable under the Bankruptcy Code. *Id.* After working its way through the courts, the Supreme Court found that Ohio was seeking only money from Kovacs to pay the cost of the cleanup. *Id.* at 283. Therefore, the Court concluded that the State had converted Kovacs's equitable obligation into a monetary obligation which rendered the claim dischargeable under the Bankruptcy Code. *Id.*

The Court observed, however, that the person in possession of the site "may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions." *Id.* at 285. Thus, an injunction requiring the amelioration of ongoing pollution, as opposed to one requiring cleanup of past pollution, may not be discharged. This observation in *Kovacs* came to fruition in *Torwico*. There, the Third Circuit determined that the ISRA responsibilities related to the ongoing environmental obligation to ensure that there is no ongoing pollution from a site. The *Torwico* court made clear the distinctions from the situation in *Kovacs* when it focused on the ongoing contamination at issue. For example, the *Torwico* court stated that "here it is clear that the state demanded ... that [Torwico] take action to ameliorate ongoing hazard." *Torwico*, 8 F.3d at 150. The hazard identified by the state was that a "seepage pit was a continuing problem that was leaking hazardous material into the surrounding environment." *Id.* The *Torwico* court concluded:

> Unlike *Kovacs*, the state in this case neither seeks money *nor has a right to payment* under the statutory authority asserted or the Order imposed; the state seeks compliance with its laws through cleanup of a current hazardous situation. In the words of *Chateaugay*, "there is no option to accept payment in lieu of continued pollution," and there is an order intended to "ameliorat[e] continued pollution"; thus, the Order "is not an order for breach of an obligation that gives rise to a right of payment as is for that reason not a 'claim.'"

Torwico, 8 F.3d at 151 (citations omitted) (emphasis added).

The situation here is not analogous to *Torwico*. Here, the state *does* assert a right to payment under the Spill Act, which is the statutory authority cited in the Directive. The issue here is not one of "continued pollution," but of assessment and remediation of prior releases. The Directive does not seek to ameliorate any ongoing pollution. To the extent NJDEP contends that there is ongoing pollution at the Hexcel facility, Hexcel retains its responsibilities under

ISRA and the ACO. However, neither ISRA nor the ACO are the basis of the Directive and Hexcel does not seek to discharge those environmental obligations. Thus, unlike in *Torwico*, the Directive here is an order which, when breached, *does* give rise to a right of payment. The requirements of the Directive therefore are claims under the Bankruptcy Code that are dischargeable in bankruptcy. *See CMC Heartland Partners*, 966 F.2d at 1147 ("To avoid the conclusion that it is repackaging a forfeited claim for damages, the EPA must establish that harmful releases are threatened or ongoing.... Otherwise there is no nuisance to clean up.")

As the Second Circuit stated in *Chateaugay*:

> [A]n order to clean up a site, to the extent that it imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, is a "claim" if the creditor obtaining the order had the option, which CERCLA confers, to do the cleanup work itself and sue for response costs, thereby converting the injunction into a monetary obligation.

Chateaugay, 944 F.2d at 1008; *see also, Torwico*, 8 F.3d at 150 (quoting the same with approval). Here, the Spill Act, like CERCLA, confers upon NJDEP the option to clean up the Passaic River itself and then sue Hexcel and others for its costs, an option which NJDEP emphasized in its Directive. Directive p. 54, ¶¶ 294, 295, 299 and 304. As such, the Directive can be converted into a monetary obligation dischargeable under the Bankruptcy Code.

Chateaugay stated that if an order directed the removal of past wastes as well as the amelioration of ongoing pollution, such order would not be dischargeable in bankruptcy:

> EPA is entitled to seek payment if it elects to incur cleanup costs itself, but it has no authority to accept a payment from a responsible party as an alternative to continued pollution. Thus, a cleanup order that accomplishes the dual directives of removing accumulated wastes and stopping or ameliorating ongoing pollution emanating from such wastes is not a dischargeable claim.

Chateaugay, 944 F.2d at 1008. Here, the Directive does not have any duality regarding its

mission: it requires only the study and remediation of past natural resources damages. The Directive does not order the amelioration of any ongoing pollution and thus, the *Chateaugay* court's admonition is not relevant here. And, as noted above, to the extent NJDEP believes there is ongoing pollution from the Hexcel site into the Passaic River, such pollution is denied by Hexcel and would remain a fact issue not susceptible to summary judgment.

Finally, *In re Udell*, 18 F.3d 403 (7th Cir. 1994), cited by NJDEP in Point III of its brief, supports the argument that Spill Act claims are claims dischargeable in bankruptcy. NJDEP claims that the concurring opinion in *Udell* finds that any outcome other than a finding that a cleanup order was not a "claim" would be "patently absurd." NJDEP Brief at 17-18 (citing *Udell*, 18 F.3d at 412). This is a blatant mischaracterization of the concurring opinion. In *Udell*, Udell was subject to a three-year covenant not to compete against his former employer. The covenant gave the employer a right to both an injunction and liquidated damages. The Udell majority began by framing the argument as follows: "We must decide whether § 101(5)(B) requires any connection between the equitable and the legal remedies beyond the fact that both remedies arise from the same breach of performance." 18 F.3d at 406. It answered the question in the affirmative, holding that an equitable remedy was only dischargeable as a claim if the remedy itself also gave rise to monetary damages, not just the originating breach. *Id.* at 407-10. Therefore, the court found that the injunction in question was not a claim dischargeable in bankruptcy because the available remedies (the injunction and the liquidated damages) were cumulative, not alternative. *Id.* The concurring opinion, agreeing in the judgment, determined that it would be absurd to read section 101(5)(B) as turning an injunction into a claim any time a breach of an obligation would give rise to money damages as well as an injunction. *Id.* at 412. The money damages must be an alternative to the injunction. *See also id.* at 407-408 ("the

cleanup order [in *Kovacs*] was a "claim," not because Ohio already had a $75,000 judgment arising from the same breach, but because Ohio's actions had effectively converted the cleanup order into money damages") and ("an injunction ordering the offender to remove accumulated wastes...'is a "claim" if the creditor obtaining the order had the option, which CERCLA confers, to do the cleanup work itself and sue for response costs, thereby converting the injunction into a monetary obligation'" (citing *Chateaugay*, 944 F.2d at 1008)). Here, the Spill Act, like CERCLA, confers upon NJDEP "the option ... to do the cleanup work itself and sue for its costs, thereby converting the injunction into a monetary obligation." Thus, the orders issued by NJDEP in the Directive pursuant to the Spill Act are "claims" that are dischargeable in bankruptcy.

C. Hexcel Does Not Seek To Discharge Any Responsibilities Under The Administrative Consent Order.

In Point III of its Brief, NJDEP argues that Hexcel may not discharge in bankruptcy the liabilities agreed to under the Administrative Consent Order.[8] Hexcel agrees. The only liabilities sought to be discharged here relate to the Directive, not to the ACO or to Hexcel's environmental liabilities under ISRA.

NJDEP points to various provisions of the ACO, all of which are irrelevant because the ACO is not at issue here. First, NJDEP refers to language in the ACO that requires Hexcel to delineate off-site environmental contamination and to remediate any contamination identified. NJDEP Brief at 9 (citing ACO ¶¶ 10B and 10C). NJDEP essentially argues that Hexcel seeks to sidestep this responsibility in this proceeding even though the ACO states that the obligations set forth therein are not dischargeable in bankruptcy. NJDEP Brief at 10 (citing ACO ¶ 12D). As noted above, Hexcel does not seek to discharge its responsibilities under the

[8] There also are references to the same argument in Part I of NJDEP's brief.

ACO, but intends to fulfill the requirements of Paragraphs 10B and 10C of the ACO. Indeed, Hexcel has been cooperating with NJDEP to meet these requirements for many years now.[9]

Regarding the delineation of off-site contamination, at NJDEP's request, Hexcel has sampled sediments in the Saddle River at the outfall of an industrial sewer adjacent to Hexcel's Lodi Facility. Ex. C to Leifer Decl. Hexcel is awaiting NJDEP approval of this delineation and/or request for additional sampling. Hexcel also is awaiting NJDEP direction regarding cleanup of the sediments, if necessary. But these requirements under the ACO are of an entirely different character than the claims made by NJDEP under Directive. NJDEP has not interpreted the ACO as extending Hexcel's obligations beyond the immediate environs of the Lodi Facility on the Saddle River. In contrast, the Directive requires Hexcel to contribute to an assessment and remediation of natural resources injuries in the Passaic River, many miles downstream from the Lodi Facility.

Second, NJDEP points to language stating that the ACO shall not constitute a waiver of any statutory right of NJDEP to implement additional remedial measures. NJDEP Brief at 10 (citing ACO, ¶ 14). Paragraph 14 represents a simple reservation of rights, and not a concrete obligation under the ACO. NJDEP clearly retains its rights to ensure that the environmental laws of New Jersey are followed. To the extent those rights pertain to the prevention of ongoing pollution from the Lodi Facility, Hexcel concedes that such obligations were not discharged in bankruptcy. However, to the extent those rights, when exercised, amount to a claim related to past discharges, that claim may have been discharged in bankruptcy. Thus, while NJDEP may retain the right to seek the cleanup of "contamination that emanated from the Lodi Site to other off-site areas that would be identified at a later time," Brief at 10, that does not

[9] Pursuant to its responsibilities under ISRA and the ACO, Hexcel has undertaken a program to clean up the Lodi Facility in order to prevent migration of pollutants offsite. *See, e.g.*, Exs. B and C to Leifer Decl.

necessarily make the exercise of those rights the act of an agency as a regulator as opposed to a creditor, if the claims made meet the definition of claim under the Bankruptcy Code.

Finally, NJDEP cites language that provides the obligations under the ACO "shall constitute continuing regulatory obligations imposed pursuant to the police power of the State of New Jersey, intended to protect the public health, safety and welfare." NJDEP Brief at 17. Once again, Hexcel does not challenge the statement that the ACO, pursuant to ISRA, sets forth environmental obligations that may not be discharged in bankruptcy. Hexcel is complying with the ACO and has every intention of continuing to comply with the ACO. The claims sought to be discharged here relate to NJDEP's claims under the Directive and the Spill Act. Those claims do not present environmental obligations, but claims dischargeable under the Bankruptcy Code, and discharged under Hexcel's confirmed Plan.

D. Hexcel Is Not Seeking Pre-Enforcement Review And Thus This Adversary Proceeding Is Not Barred.

NJDEP's brief cites a limited number of cases that stand for the proposition that "the use of judicial process to review defenses to Spill Act liability for a discharge of hazardous substances may be asserted only after NJDEP seeks to enforce a directive in court." NJDEP Brief at 19. These cases are inapposite. NJDEP mischaracterizes what determination Hexcel seeks from this bankruptcy court: Hexcel seeks only to discharge those claims that NJDEP could have fairly contemplated at the time of Hexcel's bankruptcy. This does not amount to pre-enforcement review. Unlike the defendants in each of the cases that NJDEP cites, Hexcel is a not seeking a determination of the scope of its liability. Hexcel does not seek a determination of "the extent of its liability resulting from hazardous substance discharges at it Site," NJDEP brief at 18, nor does Hexcel seek a determination that "it is not a party responsible for the environmental cleanup of the Lower Passaic River" or whether the "facts outlined in the Passaic

River Directive give rise to Spill Act liability for Hexcel in regard to the Passaic River." NJDEP Brief at 23. Rather Hexcel simply seeks a determination that its liability, to the extent that it even exists, was discharged in bankruptcy.

NJDEP focuses on the fact that in *Matter of Kimber Petroleum Corp.,* 110 N.J. 69 (1988), *app. dism.* 488 U.S. 935 (1988), the court established a procedure that appeased the due process concerns stemming from the Spill Act's harsh liability scheme, and disallowed pre-enforcement review under the Act. In *Kimber*, alleged dischargers of hazardous waste appealed a NJDEP directive requiring them to pay over $2 million to fund the construction of an alternate water supply in order to remedy groundwater contamination traced to a gasoline station leased by Kimber Petroleum. 110 N.J. at 72. Kimber Petroleum disputed the claims of the directive, and sought to invalidate its liability by challenging the constitutionality of the Spill Act. *Id.* Specifically, Kimber Petroleum asserted that the Spill Act's treble damages provisions violate parties' due process rights under the federal and state constitutions. *Id.* at 73. Because a discharger's liability under the Spill Act is strict, "without regard to fault," and only limited defenses not associated with fault are available, the court found that reading a good cause defense into the Act's treble damages provisions was necessary in order to ameliorate any due process concerns. *Id.* at 73, 86. If the party opposing treble damages had an objectively reasonable basis for believing NJDEP's directive was either invalid or inapplicable, the *Kimber* court allowed treble damages to be reviewed by a court, post-enforcement. *Id.* at 84.

NJDEP's brief also cites *Matter of J.I.S. Indus. Serv. Co. Landfill,* 110 N.J. 101, 112 (1988), for the proposition that NJDEP may issue a directive "when it deems necessary or appropriate, so long as the responsible party has the opportunity to assert a good-cause defense." NJDEP brief at 21. Similarly, NJDEP's brief highlights *State v. Mobil,* 246 N.J. Super. 331, 333

(App. Div. 1991) for the holding that an alleged polluter is not entitled to pre-enforcement review because such review would require "courts to become mediators, and ultimately arbitrators in remediation" efforts between NJDEP and potentially responsible parties ("PRPs"). NJDEP Brief at 21-22. NJDEP's point is clear: the New Jersey courts do not allow pre-enforcement review under the Spill Act.

However, with respect to the issues at hand in Hexcel's complaint, *Kimber, J.I.S* and *State v. Mobil* are not instructive. Hexcel does not contest that pre-enforcement review of the merits of the Directive is prohibited by the courts' interpretation of the Spill Act. Instead, Hexcel properly maintains that the facts at hand are not akin to the pre-enforcement review cases NJDEP cites. Hexcel, unlike *Kimber Petroleum*, does not dispute the terms of NJDEP's Directive, nor does Hexcel seek to question NJDEP's ability to threaten treble damages for non-compliance. Hexcel does not question NJDEP's authority to make such demands on PRPs, nor its ability to prescribe and impose remedial measures. Hexcel, unlike the alleged polluter in *J.I.S.,* does not seek a ruling that NJDEP may not issue a directive to a PRP prior to judicial review of the facts giving rise to the Directive. Finally, Hexcel, unlike the alleged polluter in *State v. Mobil*, does not ask this court to serve as a mediator or an arbitrator between NJDEP and Hexcel, and review the terms of the Directive. Hexcel merely seeks a determination from this bankruptcy court that to the extent NJDEP has identified Hexcel as being a liable party, such liability was discharged in bankruptcy. Further, a ruling that Hexcel's liability, to the extent it ever existed, was discharged in bankruptcy, does not set a precedent that PRPs may seek and receive pre-enforcement review of NJDEP's Directive on the issues of whether a PRP is a liable party and the extent of that liability. *Kimber, J.I.S.,* and *State v. Mobil* are inapplicable to Hexcel, and stand as good law regardless of this court's ruling on Hexcel's bankruptcy issue.

In addition, cases discussing the purposes behind the pre-enforcement review section of CERCLA (Section 113(h), 42 U.S.C. § 9316(h)) are instructive given the similarity between CERCLA and the Spill Act. Those cases indicate that the purposes are to (1) avoid delay in the government's site assessment and cleanup efforts and (2) prohibit piecemeal litigation where potentially responsible parties seek to second guess the government's assessment and environmental cleanup plans. *See, e.g., Reardon v. United States*, 947 F.2d 1509, 1513 (1st Cir. 1991). Yet these purposes only would be undermined if Hexcel were challenging the existence of any liability and/or the scope of that liability to NJDEP. This adversary proceeding will not delay the government's assessment and cleanup and does not represent piecemeal litigation given that the issue is a bankruptcy issue particular to Hexcel. In contrast, the Bankruptcy Code's objective of providing the debtor with a fresh start would be severely undermined if the Court agrees that a determination regarding whether NJDEP's adversary proceeding is barred,[10] because Hexcel would be forced to wait years before it could even seek a determination that the claims against it were discharged. In the meantime, Hexcel's fresh start would be clouded to the detriment of those parties who reasonably relied on Hexcel's discharge as being effective against claims based on Hexcel's pre-petition conduct, such as post-confirmation lenders and investors.

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[10] In *Manville Corp. v. United States*, 139 B.R. 97 (S.D.N.Y. 1992) the court, discussing the interaction of CERCLA and the Bankruptcy Code, noted that the Bankruptcy Code seeks to provide a debtor with a "fresh start" while CERCLA seeks to delay litigation by focusing on remedial activities. *Manville*, 139 B.R. at 102-3 (citing *In Re Chateaugay.*, 944 F.2d at 999)). Noting the conflict, the court explained that the Bankruptcy Code's fresh start objective is implicated even by a post-confirmation adversary proceeding. *Id.* at 105. In finding that Section 113(h) of CERCLA, 42 U.S.C. § 9613(h) (pertaining to pre-enforcement review) did not apply to bar Manville's adversary proceeding, the court stated: "[A]bsent clear and convincing evidence that Congress wished to preclude review of the dischargeability of environmental claims, this Court should not reach to create an exception to Bankruptcy's across-the-board legislative scheme to advance the objectives of another statute." *Id.* at 104 (citing *Chateaugay*, 944 F.2d at 1002). Similarly here, absent clear evidence from the New Jersey courts that adversary proceedings would be barred, the Court should not subjugate the objectives of the Bankruptcy Code to the Spill Act.

Finally, NJDEP has failed to explain how New Jersey's bar on pre-enforcement review affects this Bankruptcy Court's ability to hear and decide the bankruptcy issue before it. This Court is the proper forum for litigation over whether the claims made by NJDEP were discharged in Hexcel's prior bankruptcy. Article XI of the confirmed Plan[11] ("Retention of Jurisdiction") contemplates the potential for post-confirmation litigation of whether a claim has been discharged under the Plan, and expressly provides for *exclusive* jurisdiction of the Bankruptcy Court to determine matters pertaining to Section 1142 of the Bankruptcy Code. *See In re Johns-Manville Corp.*, 7 F.3d 32, 34 (2d Cir. 1993) (bankruptcy court's post-confirmation authority is limited to matters concerning the implementation of a confirmed plan); *accord In re Goodman*, 809 F.2d 228 (4th Cir. 1987). Moreover, NJDEP already submitted to the jurisdiction of this bankruptcy court with respect to its environmental claims when it filed a proof of claim. NJDEP has not advanced any basis in state law or otherwise that would deprive this Bankruptcy Court of its exclusive jurisdiction.[12]

In any event, NJDEP's pre-enforcement review arguments are not applicable here because this adversary proceeding does not seek review of the terms of the Directive.

E. Hexcel's Complaint Is Ripe For Judicial Review.

NJDEP's remaining argument that Hexcel's complaint is premature lies in its allegation that its Directive and subsequent actions do not amount to enforcement action ripe for judicial review. In determining the ripeness of a case, courts routinely apply the two-pronged

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[11] Article XI of the Plan states in pertinent part:
"The Bankruptcy Court shall have exclusive jurisdiction of all matters arising out of, and related to, the Chapter 11 Case and the Plan pursuant to, and for the purposes of, Sections 105(a) and 1142 of the Bankruptcy Code and for, among other things, the following purposes: ...
(b) To determine any and all pending adversary proceedings....
(h) To hear and determine disputes arising in connection with the interpretation, implementation, or enforcement of the Plan. ..."

[12] Unlike Section 113(h) of CERCLA, which is a federal statute that specifically withdraws jurisdiction from federal courts to hear pre-enforcement challenges to specified CERCLA actions, the Spill Act is a New Jersey statute that does not and could not deprive this federal court of jurisdiction in analogous circumstances.

test developed by the Supreme Court in *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). Under this test, the court should evaluate (1) the fitness of this matter for judicial review and (2) the hardship to the parties if the court refuses to entertain the case. *Abbott Labs*, 387 U.S. at 149. If the matter is fit for judicial review, it is more likely ripe, and the court should review the matter. *Id.* If the parties would suffer hardship by the court refusing to hear the matter, then the case should be reviewed, even if not fully fit for review. *Id.*

1. Hexcel's Complaint Is Fit For Judicial Review.

In determining whether the issue is fit for judicial action, courts look at (1) whether the government's actions are final and (2) whether the issue is purely legal. *Abbott Labs.*, 387 U.S. at 149.

a. The actions of NJDEP rise to the level of threatened enforcement that has the effect of final enforcement.

NJDEP asserts that because it "has not issued a final agency decision or commenced enforcement proceedings," *see* NJDEP Brief at 24, Hexcel's challenges to the Directive are premature. At the outset, absolute finality is not a requirement. What is necessary is that NJDEP's actions are "plainly final in threatening future enforcement actions" against Hexcel "unless it chooses the path of least resistance and settles." *Manville,* 139 B.R. at 108. Similarly, the official commencement of enforcement proceedings is not the necessary threshold for a case to be ripe for adjudication. Rather, "threatened enforcement or the need for a party subject to a statute or regulation to go to great lengths to prepare for the eventual enforcement of an agency's definitive action often will suffice." *Manville,* 139 B.R. at 107.

Addressing facts analogous to that presented by Hexcel, the court in *Manville* held that Manville's declaratory action against the EPA was ripe for review despite the fact that the enforcement action was not final. *Id.* at 108. In *Manville,* the debtor had received a Chapter

11 discharge, the government had failed to file a claim in the bankruptcy proceeding, and the debtor brought a declaratory judgment action to have the obligation discharged. *Id.* at 99. The government identified Manville as a potentially responsible party at a number of contaminated sites. *Id.* at 100. At some sites, the government had threatened Manville with enforcement action, and at others, it used coercive measures to try to force the debtor to settle. *Id.* at 107. EPA had put the debtor in a position that would either force Manville into an early settlement or force Manville to wait and possibly incur greater liability. *Id.* at 107-108.

NJDEP's Directive and subsequent correspondence to Hexcel is firm in its demands to Hexcel and other Respondents. For example, the Directive states unequivocally that: Respondents "*are responsible* for the hazardous substances in the Lower Passaic River;" and "*are strictly liable*...for all cleanup and removal costs." Directive p. 53-54, ¶¶ 293, 294 (emphasis added). Further, Hexcel is "direct[ed]...to conduct an assessment of natural resources that have been injured...:;" and "direct[ed]...to implement interim compensatory restoration" amounting to $80 million. Directive p. 54, ¶¶ 300, 301; *see* also Ex. A to Leifer Decl. at 2. Correspondence from NJDEP further threatens that "while this noncompliance with the Directive persists, each of the Group Directive recipients is subject to treble damages for funds expended to meet the requirements of the Directive." *See* Ex. A to Leifer Decl. at 1. The letter makes clear that it serves as a "*final* effort toward settlement" before it is forced "to expend additional funds (with concomitant treble damage liability)." *Id.* (emphasis added). Should the recipients not meet their demands, NJDEP will have "no alternative to litigation." *Id.* There is no question that NJDEP's actions and threats are final. Any attempt by NJDEP to depict their Directive and subsequent correspondence as mere notification letters clearly is disingenuous. *See* NJDEP Brief at 25 (stating "the Directive...is merely a notice").

NJDEP unmistakably has asserted that if Hexcel does not comply with its terms, litigation will commence, and additional costs and damages will be assessed against Hexcel.[13] NJDEP has threatened Hexcel with specific enforcement and has initiated coercive settlement processes, severely jeopardizing Hexcel's interests should it choose not to participate. *Id.* Further, the letter emphasized the use of additional public funds and the application of treble damages, should compliance with the Directive, including contribution of $80 million, not occur. Ex. A. NJDEP's Directive and subsequent letters places Hexcel in a situation where it may either settle, assuming liability for a significant amount of cleanup costs, despite this liability having been discharged in bankruptcy, or it may wait, exposing itself to draconian defense and indemnity costs. Because NJDEP's activities have progressed to the point of unequivocal demands against Hexcel, the court need not speculate or forecast whether NJDEP intends to pursue Hexcel for money stemming from the Site. Thus, this court should find that NJDEP's threatened enforcement and actions thus far rise to the level of finality necessary for review of this matter.

b. The facts in this case arise out of events that have already occurred and thus, the case is fit for review.

In *Manville*, the court held that where the factual issues are based primarily on facts that took place in the past, the proceeding is fit for judicial review. *Manville,* 139 B.R. at 106. While the Hexcel Complaint does not raise purely legal issues, "the facts upon which the legal determinations would be made stem mostly from the past and are fit for declaratory judgment" that NJDEP's claims were discharged in bankruptcy. *Id.* at 108 (citing *Chateaugay Corp.,* 944 F.2d at 1001; *In re Jensen,* 127 B.R. 27 (Bankr. 9th Cir. 1991)). The factual issues

[13] As a result, Hexcel already has incurred, and is continuing to incur, significant costs in order to participate in a PRP group created to respond to NJDEP's Directive. These costs include both legal and group administrative costs.

presented in Hexcel's complaint are based on events that took place in the past.[14] Hexcel's bankruptcy petition already has been granted, years prior to NJDEP's Directive. The pollution which the Directive complains of stems from pre-petition activity. Accordingly, this action is fit for judicial review.

2. Hexcel Will Suffer Undue Hardship If The Court Refuses To Hear This Matter.

In deciding that the case was ripe for review, the *Manville* court also emphasized that the debtor would suffer more hardship if the matter were not decided than the government would suffer if the case were decided. *Manville*, 139 B.R. at 109. As the *Manville* court stated, "[the] carefully constructed reorganization...may realistically be threatened by the EPA's actions...A wrong move has the potential of rendering Manville's reorganization one of the biggest wastes of judicial resources ever...postponing a decision will likely work a substantial hardship on all those subject to the Manville reorganization, thus rendering the controversy ripe for adjudication." *Id.* Again, the court stressed that what matters is that NJDEP's actions are "plainly final in threatening future enforcement actions" against Hexcel "unless it chooses the path of least resistance and settles."[15] *Id.* at 108.

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[14] As discussed earlier, NJDEP has provided no evidence that there is ongoing pollution emanating from the Lodi Facility affecting the Passaic River. Were the specter of ongoing pollution relevant to the case at hand, the existence of such ongoing pollution would be a fact issue not susceptible to summary judgment. However, whether there is ongoing pollution is not relevant here because Hexcel seeks only to discharge NJDEP's claims under the Spill Act regarding past releases, and not ongoing environmental obligations pursuant to ISRA or the ACO.

[15] This feature is what distinguished *Manville* from *In re Combustion Equipment Associates, Inc.*, 838 F.2d 35 (2d Cir. 1988). In *Combustion Equipment,* the court held that the impingement on the fresh start caused by the EPA action at issue was speculative because there was only a *possibility* of EPA action. *Manville* at 106. By contrast, *Manville* was threatened with definitive enforcement action: Manville (like Hexcel here) received correspondence explicitly stating that it must reimburse EPA (here NJDEP) for costs incurred to date and future response costs. *Id.* at 108. The letters, similar to those Hexcel received, sought settlement and did not qualify the formal demand for payment. *Id.* For this reason, the court found that the EPA's actions were "sufficiently final for review" because they amounted to threatened enforcement unless Manville agreed to settle *Id.*

Like *Manville*, Hexcel's reorganization already has been instituted by this court, and yet Hexcel presently is subject to increasing fines and penalties and the threat of being forced into a coercive settlement for up to $80 million for claims discharged in bankruptcy. Allowing NJDEP to seek environmental claims against Hexcel post-petition could work a hardship upon not only upon Hexcel in having to defend this impending litigation, but also against Hexcel's current investors and creditors. Hexcel's post-confirmation lenders, investors and creditors could be harmed for reasonably relying upon the fact that NJDEP's claims, arising from pre-petition conduct, were discharged in bankruptcy. This, such a result would allow NJDEP to completely circumvent the objectives of the Bankruptcy Code to the detriment of not only Hexcel, but also multiple other parties.

In contrast, NJDEP is not prejudiced in any way by this bankruptcy court determining if its claims were discharged. The only harm NJDEP asserts is rooted in the policy disallowing pre-enforcement review under the Spill Act. However, this policy is irrelevant to the case at hand – *the efficient and effective enforcement of the Spill Act is not threatened by the determination Hexcel seeks*. Hexcel's request that this court determine whether the claims under the Directive were discharged does not affect the terms or requirements of the Directive, nor does it impact the obligation of the myriad other recipients to comply with such terms and requirements. Therefore, NJDEP cannot identify any hardship it may face should this court allow Hexcel to seek resolution of the bankruptcy issue it presents in its Complaint.

IV. CONCLUSION

For the reasons set forth above, the Court should deny NJDEP's motion for summary judgment.

Respectfully submitted,

BAKER BOTTS LLP

and

GOLDBERG, STINNETT, MEYERS & DAVIS
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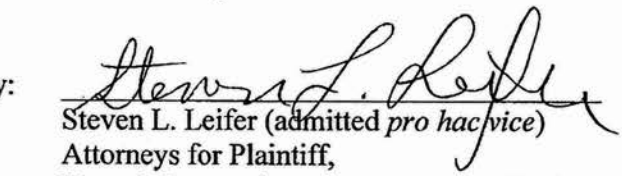
By: 

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